Supreme Court, U.S.
FILED
OCT 2 1995
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No. 95-352

In The

Supreme Court of the United States

October Term, 1995

HOLIDAY INNS, INC., a Tennessee Corporation,

Petitioner,

vs.

GORDON McNEELY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit properly formulated and applied the "single filing rule" in that the purposes of the charge filing requirement were fully satisfied.

2. Whether the question of the timeliness of the charge supporting the application of the single filing rule which was not raised in the trial court can be considered by this Court.

LIST OF PARTIES

The petitioner, Holiday Inns, Inc., is a Tennessee corporation, which was the defendant-appellee in the court below.

Respondent, Gordon McNeely, is an individual.

Others who are not petitioners or respondents are plaintiffs in the District Court proceedings. These individuals are: Ronald Howlett, Graves Ivey, Siegfried Konetzny, Jeffrey McLaughlin, Homayoon Meshginpoosh, Terry Phillips, Edward Rinckel, Frederick Roozen, Christopher Ryan, Rene Schiegg and Fred Wright.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The respondent, Gordon McNeely, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the petitioner, Holiday Inns, Inc.

OPINIONS BELOW

This case was brought in the Western District of Tennessee pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, by 11 plaintiffs, who are not parties to this proceeding. Leave was sought to add McNeely as a party-plaintiff to this action. The trial court, finding that it did not have jurisdiction over McNeely's claim, denied that request in an unpublished opinion. (App. B, pp. A19-A22.)[1]

The Sixth Circuit Court of Appeals reversed the trial court's denial of leave to amend the complaint to add McNeely as a party plaintiff. The court's opinion, issued on March 7, 1995, is reported at 49 F.3d 189 (6th Cir. 1995). (App. A., pp. A1-A18.)

Following the issuance of the Sixth Circuit Opinion, Holiday Inns moved for a rehearing with suggestion for rehearing en banc. The Sixth Circuit denied that request in an unpublished opinion issued on May 9, 1995. (App. C, pp. A23-A24.)

STATUTE INVOLVED

The statute in issue is the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*

STATEMENT OF THE CASE

Holiday Inns' petition arises from the Sixth Circuit's decision to permit respondent Gordon McNeely to join as a party plaintiff an age discrimination claim pending in the Western District of Tennessee. That lawsuit, brought by 11 former employees of petitioner Holiday Inns, Inc., alleged that the

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1. "App." refers to the Appendix to Holiday Inns' Petition for Writ of Certiorari.

termination of plaintiffs' employment had been impermissibly based on age in violation of the ADEA. The Court of Appeals applied the single filing rule which permits an individual who has not filed a timely charge of discrimination to rely, or piggy-back, on charges timely and properly filed by other plaintiffs. This rule has been adopted by all Circuits which have considered the issue in the context of the ADEA and Title VII.

The plaintiffs and McNeely were all employed by Holiday Inns, Inc. Each of them was notified that their jobs were eliminated and told to apply for any position within the company for which they were qualified. Despite their applications, McNeely, the named plaintiffs, and many other employees were notified on June 7, 1991, that they were terminated. (JA, pp. 8-32.)[2]

Specifically, McNeely applied for the position of Senior Accountant and notified Holiday Inns that he would be willing to accept other positions for which he was qualified. McNeely, however, was not selected for any position. After notifying McNeely of his termination, Holiday Inns requested that he continue working for several months and sign a waiver and release of all rights immediately. McNeely complied with both requests. He remained with Holiday Inns until October, 1991. (JA, pp. 87-89.)

In September 1991, Holiday Inns hired Linda Butler, who was 28 years old, as Senior Accountant. McNeely trained her for several weeks before he left the company. (*Id.*)

The 11 plaintiffs filed timely charges of age discrimination with the Equal Employment Opportunity Commission. In these charges, plaintiffs stated that they were instructed to apply for

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2. "JA" refers to the Joint Appendix filed with the Sixth Circuit.

other available positions, were then informed on June 7, 1991 that they would not be placed in any available positions, and were therefore terminated. Further, the charges contained allegations that younger, less qualified employees were hired in positions for which the plaintiffs were qualified.

For example, Graves Ivey, one of the original plaintiffs, filed a charge which stated that he "along with others similarly situated" was told his position was being eliminated, that "most of the employees hired . . . were younger, less senior and less qualified persons" and that after the reorganization, "positions are becoming available which are being filled by younger, less qualified persons." (JA, p. 58.) These charges, by their numbers and similar allegations, put the EEOC and Holiday Inns on notice of potential class claims. (*Id.*)

Subsequently, plaintiffs filed a judicial complaint alleging age discrimination on October 22, 1992. (JA, pp. 8-33.) On June 4, 1993, plaintiffs and McNeely filed a Motion to Amend the complaint to add McNeely as a party plaintiff. (JA, p. 54.) Contrary to petitioner's assertions, plaintiffs did not rely solely on Graves Ivey's charge to support the amendment. Plaintiffs, in fact, relied on all "the charges filed by the named plaintiffs" which alleged similar factual circumstances to those under which McNeely was terminated to meet the notification requirement of the ADEA. (JA, pp. 55-56, ¶¶ 2-6.) Although the plaintiffs and McNeely established that the amendment was proper because McNeely was similarly situated to plaintiffs and defendant was on notice that the consequences of the plaintiffs' EEOC charges may "transcend an isolated individual's claim", the motion was denied by Judge Gibbons in an order entered on July 16, 1993. (App. B, pp. A19-A22.)

The District Court found only that "Ivey's charge failed to give [Holiday Inns] fair and adequate notice of a potential class

charge of discrimination" and therefore denied plaintiffs' motion. The court never addressed the timeliness of Ivey's charge because the petitioner never raised the issue.

McNeely appealed to the Sixth Circuit Court of Appeals which reversed the trial court's decision. In its March 7, 1995 opinion, the court held that Ivey's charge "provides notice that individuals other than Ivey were affected by Holiday Inns' actions and that those who were affected were older more senior employees." The court concluded "McNeely may invoke the single filing rule and join the named plaintiffs." (App. A, A-12.)

In reaching this decision, the Sixth Circuit joined the other circuits in holding that the single filing rule applied to ADEA cases. (App. A, A1-A18.) Also, in accord with the other Circuits, the Sixth Circuit concluded that a charge must satisfy the notice and conciliation functions of the filing requirement by indicating that a group of individuals, not just one aggrieved person, was affected by the employer's action. There was nothing novel in this approach.

The Sixth Circuit, then applied the standard to this case. Because the size of the relevant work unit could not be determined from the record, the court utilized two different analyses, finding sufficient notice to the EEOC and employer to support piggy-backing in both instances. The court concluded that because McNeely was the only potential plaintiff in his case, his situation was analogous to the small work unit. Thus Ivey's charge, which raised grievances identical in substance and time to McNeely's, was sufficient. In addition the court found the Ivey charge contained sufficient information to provide notice to defendants that individuals other than Ivey, like McNeely, were affected by Holiday Inns' actions. Since adequate notice was provided, the single filing rule was properly invoked. The decision of the trial court, therefore, was properly reversed.

REASONS FOR DENYING THE WRIT

The Sixth Circuit's adoption and application of the single filing rule fully comported with prior holdings of the other Circuits and its own decisions. The standard used also fulfilled the purposes of the charge filing requirement as established by this Court and the Circuit courts. Moreover, the first question presented by petitioner, *i.e.*, the timeliness of the relied upon charge, was not preserved for appeal. Ultimately the petitioner has failed to present any special or important reasons for granting the petition, nor any other basis recognized by this Court, and as a result, the petition should be denied.

I.

THE FORMULATION OF THE SINGLE FILING RULE ADOPTED AND APPLIED BY THE SIXTH CIRCUIT DOES NOT CONFLICT WITH ITS PRIOR DECISIONS OR OTHER CIRCUITS.

At issue in this appeal are the requirements for application of the "single-filing" rule. It is undisputed that not every aggrieved individual must file an administrative charge of age discrimination to maintain, file, or participate in a judicial action. The single filing rule has been formulated by the courts[3] so that an individual who has not filed a timely administrative charge, *i.e.*, a "non-complying plaintiff" can join in a lawsuit if reliance can be placed on a charge of another individual which was timely and relevant. *Zuckerstein v. Argonne Nat'l Laboratory*, 663 F. Supp.

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3. Although the single filing rule is not explicitly contained in the ADEA, the statute was amended in 1978 to provide only that a charge need be filed, eliminating the requirement that "the individual" give notice of intent to bring suit. Thus the statute clearly allows the charge filing requirement to be met by someone other than the aggrieved individual, including another person alleging discrimination against the same employer.

569 (N.D. Ill. 1987). Indeed, the EEOC has concluded that the filing requirement is satisfied "so long as the matter complained of was within the scope of a previously filed charge, regardless of who filed it." 43 Fed. Reg. 138, 139 (1983).

The single filing rule has been adopted without controversy by all Circuit Courts which have considered the issue. *See, e.g., Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1056 (2nd Cir. 1990); *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326-335 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984); *Lusardi v. Lechner*, 855 F.2d 1062 (3rd Cir. 1988), *cert. denied*, 111 S. Ct. 1641 (1991); *Ezell v. Mobile Hous. Bd.*, 709 F.2d 1376, 1381 (11th Cir. 1983); *Foster v. Gueory*, 655 F.2d 1319, 1322 (D.C. Cir. 1981); *Wheeler v. American Home Prods. Corp.*, 563 F.2d 1233, 1239 (5th Cir. 1977); *Anderson v. Montgomery Ward*, 852 F.2d 1007 (7th Cir. 1988); *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876, 882-883 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); and *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980).

The Sixth Circuit recently adopted the single filing rule. In *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836 (6th Cir. 1994), the court applied the single filing rule in a Title VII case to allow a sexual harassment complainant who had not filed a charge to piggy-back on a timely filed charge arising out of events which had occurred three years earlier.

In those cases applying the single filing rule, the courts have looked to the purposes of the charge filing requirement to determine whether a particular charge will support piggy-backing. The administrative filing serves two functions. First, it allows the EEOC to "promptly notify all persons named in such charge as prospective defendants in the action" and second, it provides an "opportunity to eliminate the alleged unlawful

practices through informal methods of conciliation."[4] *Bean v. Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979); *Anderson v. Montgomery Ward*, 852 F.2d 1007, 1016 (7th Cir. 1988). In essence, the charge must notify the EEOC and thereby the employer that the consequences of the charge may "transcend an isolated individual's claim," so that the employer "recognizes the magnitude of potential liability." *Bean, supra*, at 760.

This notification requirement in the context of the single filing rule has been expressed differently by the various Circuit courts, yet all with the same intent. The court will only apply the rule if the employer was on notice of a potential group action. The Eighth Circuit, in *Kloos v. Carter Day*, 799 F.2d 397, 400 (8th Cir. 1986), held that the administrative agency must be notified of potential class claims.[5] Similarly, the Seventh Circuit, in *Anderson, supra*, held that the administrative charge must contain an allegation of class-wide discrimination.

In *Tolliver, supra*, the Second Circuit held that a charge supports piggy-backing if it contains sufficient information to notify prospective defendants of their potential liability, *i.e.*, "that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback." *Id.* at 1056. Two different levels of notice were specified. In small groups,

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4. Contrary to petitioner's argument on p. 14, the charge would never notify the EEOC of the "identities" of potential plaintiffs. Even a charge alleging class-wide discrimination or brought on behalf of those similarly situated would not disclose the specific identities of the individuals. Thus, potential plaintiffs would remain anonymous until they sought to join the litigation.

5. Although the holding of *Kloos* indicates that the notice of class-wide claims must be in the charge itself, the court actually looked at other factors, including the number of claims filed and a letter from counsel, to determine if the notice to the EEOC was sufficient.

"mere similarity of grievances within the same general time frame" suffices to permit the single filing rule. For a large group, the EEOC and defendant must be "alerted to the broad scope of the claim". The Third Circuit has also held that no prejudice can be asserted by an employer if the complying charge notifies the employer that it discriminated against a class, not just a single individual. *Lusardi, supra*, at 1078.[6]

Following these holdings, the Sixth Circuit found a sufficient basis to allow McNeely to invoke the single filing rule. The Sixth Circuit first determined McNeely's situation was *analogous* to a small work unit described in *Tolliver* because McNeely was the only potential plaintiff who could join the *Howlett* action. As a result, Ivey's charge, which alleged grievances identical to McNeely in the same time frame, sufficed to permit piggy-backing.

The majority opinion also found that the single filing rule could be invoked based on the Ivey charge because the language provided "notice that individuals other than Ivey were affected by Holiday Inns' actions, and that those who were affected were older, more senior employees". (Slip Op., p. 12.) In his charge, Ivey stated that he "along with others similarly situated" were told that their positions were being eliminated but that they could apply and be considered for other positions. He also charged that the *employees* hired into available *positions* were younger, less senior and less qualified *persons*." (JA, p. 58.) The court correctly

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6. Similar holdings, although cited by petitioner, are in actuality consistent with the *Howlett* opinion and, therefore, do not conflict with the Sixth Circuit. For example, the Tenth Circuit, in *Mistretta v. Sandia Corp.*, 639 F.2d 588, 593-594 (10th Cir. 1980), followed *Burgett v. Cudahy Co.*, 361 F. Supp. 617 (D. Kansas 1973), and held that "it was not necessary for each of the plaintiffs to file notice if those who joined by consent were limited to the same issues" raised in the timely filed charge. The Ninth Circuit reached the same result in *Bean, supra.*

concluded from these allegations "that it was clearly foreseeable to both the EEOC and Holiday Inns that the "alleged unlawful practices affected others along with Ivey." (Slip Op., p. 12.) Since the charge notified the EEOC of the potentiality of a multi-plaintiff case, the Sixth Circuit determined McNeely could participate in the pending lawsuit as a party plaintiff.

Thus, the McNeely decision does not conflict with other Sixth Circuit cases[7] or other Circuit Courts of Appeals. The Sixth Circuit merely followed the well developed case law requiring notification of a potential group action by a complying plaintiff to invoke the single filing rule.

The petitioner's demand for a more stringent standard is premised on its desire for no anonymous plaintiffs. Although Congress mandated that there be no anonymous plaintiffs under the ADEA by virtue of the opt-in requirement,[8] there is no similar

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7. Petitioner has repeatedly claimed that *Parrish v. Ford Motor Co.*, 909 F.2d 184 (table) 1990 W.L. 109188 (6th Cir. 1990), held that the single filing rule requires allegations of class-based discrimination and therefore conflicts with this case. *Parrish*, however, did not even discuss piggy-backing or the single filing rule. It dealt exclusively with the right of an individual plaintiff to add class based allegations to his judicial complaint. That amendment was rejected because the additional allegations were not part of *his* EEOC charge. In fact, the Sixth Circuit decided this issue in a case that petitioner repeatedly ignores (and in fact has not even cited to this Court), *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836 (6th Cir. 1994). There, the Sixth Circuit, citing ADEA cases, adopted the single filing rule in a Title VII context, holding that "where a substantially related non-filed claim arises out of the same time frame as a timely filed charge, the complainant need not satisfy Title VII's filing requirement to recover".

8. Under Title VII, class actions proceed on an opt-out process so that there can be thousands of unnamed unknown class members. The process for ADEA claims is the exact opposite. An aggrieved individual must opt-in or be named to participate in the litigation. *Anderson, supra.*

requirement at the charge filing stage. Thus, an individual may remain anonymous until actually filing a complaint, or joining pending litigation as a party plaintiff. Even a charge containing allegations of class-wide discrimination does not provide the employer with the identities of all future plaintiffs. Thus, petitioner's request for a more stringent standard than that adopted by the Sixth Circuit and other courts would serve no purpose other than to deny aggrieved individuals access to court.[9] If the EEOC is notified of the "class nature" of a charge so that conciliation can occur, there is no justification for placing an onerous burden on laypeople, forcing them to meet hyper-technical requirements which are not even part of a remedial statute. *Church v. Consolidated Freightways*, 137 F.R.D. 294 (N.D. Cal. 1991).[10]

II.

THE SINGLE FILING RULE IS AVAILABLE TO INDIVIDUALS WHOSE CHARGE WAS UNTIMELY.

The single filing rule has been applied to individuals who have not filed charges at all, as well as those who filed charges

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9. This argument runs afoul of congressional intent, expressed when it amended the filing requirements of the ADEA in 1978 "to make it more likely that courts would reach the merits of the cases of aggrieved individuals" because the most common basis for dismissal of lawsuits was failure to file timely notices. 5 Rep. No. 493, 95th Cong., 1st Sess., 12 (1977).

10. In fact, several decisions have held that the notice of a potential multi-plaintiff claim need not come solely from the charge. In *Gray v. Phillips Petroleum*, 638 F. Supp. 789, *recon. den.*, 49 F.E.P. Cases 65 (D. Kansas 1986), two charges, personal in nature, relating to a termination policy provided sufficient notice of a potential group action. In *Church, supra*, notice of a group action obtained from affidavits, as well as the number of other charges filed, was sufficient.

which were untimely. Yet petitioner contends that the rule should be limited to individuals who never filed a charge. This proposition, however, is not supported by existing case law. Nor is it consistent with the purposes of the charge filing requirement or the single filing rule.

The single filing rule was adopted, in part, to prevent wasteful and futile acts.

> It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. *Oatis v. Crown Zellerbach*, 398 F. Supp. 496, 499 (1968).

For "if it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful." *Oatis, supra*, at 498. In this case, petitioner had the opportunity to conciliate 11 charges of discrimination and nothing was settled or accomplished. Whether McNeely filed late or not at all would not have affected this result. Thus, the Sixth Circuit properly refused to draw any distinction.

No reported case distinguishes between an individual who filed an untimely charge and one who filed no charge at all. In fact, the single filing rule has been applied in situations where the potential plaintiff filed an untimely charge. In *Anderson, supra*, seven individuals who had filed untimely charges with EEOC joined other plaintiffs in filing a lawsuit alleging violations of the ADEA. The employer sought to dismiss the seven plaintiffs who had not filed timely EEOC charges. Although the lower court granted the employer's motion, the Seventh Circuit ultimately held that the seven plaintiffs could proceed with the suit despite their untimely EEOC filings.

Similarly, in *Zuckerstein, supra*, plaintiff, who had filed an untimely charge with the EEOC, was allowed to participate in an ADEA lawsuit by relying on another aggrieved individual's charge which had been filed timely. *See also, Watson v. Fuller Brush Co.*, 570 F. Supp. 1299 (W.D. Mich. 1983), which held that the fact that one named plaintiff filed his administrative charge late did not bar his reliance on a timely filed charge.

The cases cited by defendant do not conflict with the holding of the Sixth Circuit in this case, the Seventh Circuit in *Anderson*, or other cited decisions of the district courts, as they deal with entirely different issues.

In *Anderson v. Unisys Corp.*, 47 F.3d 302 (8th Cir. 1995), individuals who had received right-to-sue notices from the EEOC, which starts the running of the statute of limitations, failed to file lawsuits. Long after the 90 day limitations period had run, these individuals attempted to join the already filed *Anderson* action. The lower court dismissed their claims for failure to comply with the statute of limitations and an appeal was taken. The Eighth Circuit, agreeing with the lower court, held:

> we agree with the district court that the *failure of those plaintiffs to file suit within ninety days after the receipt of their right-to-sue letters precludes them from joining Anderson's suit.* They were given an opportunity to bring suit upon the issuance of the right-to-sue letter and failed to timely do so. (Emphasis added.) *Id.*

Thus, the individuals were barred from joining the pending ADEA action for failure to comply with the statute of limitations.

In *Mooney v. Aramco*, 54 F.3d 1207 (5th Cir. 1995), the court

again did not discuss distinctions between untimely filed charges and non-filed charges in context of the single filing rule. There, plaintiffs who had failed to raise allegations regarding discriminatory severance pay in their timely filed charges or their judicial complaint, attempted to rely on a charge filed by an individual no longer part of the case.

> To allow a plaintiff to file an EEOC charge, file suit upon that charge and then, at the eleventh hour, when the statute of limitations has run, to amend his complaint in reliance on the charge of another belies the policies behind the single filing rule and controverts congressional intent. *Mooney, supra*, at p. 1223.

Thus, the Fifth Circuit held that the single filing rule was inapplicable.

The *Anderson* and *Mooney* cases have no relevance to the issues raised in the petition. The courts never considered the effect of an untimely EEOC charge on an individual's right to invoke the single filing rule. *Anderson* concerned only the failure of the "piggybacking" individual to comply with the applicable statute of limitations. *Mooney* dealt with the right of plaintiffs to *expand* their judicial complaint based on a non-party's EEOC charge. Petitioner has never argued either in the lower court or on appeal that the statute of limitations or the scope of the Ivey charge is a bar to McNeely invoking the single filing rule.

No conflict exists in the Circuits. In fact, reported decisions have allowed individuals who filed an untimely administrative charge to piggy-back on a timely filed charge. Petitioner has cited no law to the contrary.

III.

BASED ON THE RECORD, IVEY'S CHARGE IS SUFFICIENT TO INVOKE THE SINGLE FILING RULE.

Petitioner argued for the first time in the Sixth Circuit and continues to assert on appeal that Mr. Ivey's charge is inadequate to support piggy-backing, because it was untimely. For the first time, petitioner in its petition for writ for certiorari also argues that the Ivey charge is defective because it is "non-deferred". Issues not raised in the trial court should not be passed on by this Court because no opportunity was given to respondent to produce relevant evidence or legal arguments. As this Court has previously stated, issues must be presented below because it is:

> essential in order that parties may have the opportunity to offer all the evidence that they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." We have no idea what evidence, if any, [the opposing party] would, or could, offer . . . , but this is only because [it] has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, [the opposing party] should have the opportunity to present whatever legal arguments he may have. . . . *Singleton v Wulff*, 428 US 106, 120 (1976), quoting *Hormel v Helvering*, 312 US 552, 556 (1941).

The Court of Appeals noted that the timeliness of Ivey's charge was not raised before the district court. (App. A, p. A13.)

As a result, evidence relevant and critical to this issue is not part of the record. In fact, petitioner cannot establish many facts which it asserts without equivocation in its Petition for Writ of Certiorari. For example, petitioner cannot establish that Ivey's EEOC charge was untimely filed.

Even if petitioner's argument is properly before the Court, there is no merit to its position. To determine if Mr. Ivey's charge was timely, the time limits established in the ADEA must be considered. Section 626(d) provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such charge shall be filed —
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) *in a case to which section 633(b) applies, within 300 days after the alleged unlawful practice occurred*, . . .

Section 633(b) applies "in the case of an alleged unlawful practice *occurring* in a state which has the law prohibiting discrimination in employment because of age . . ." (Emphasis added.) In such a "deferral state" an aggrieved individual has 300 days to file a charge.

In this case, the discrimination against Mr. Ivey and the other plaintiffs occurred in Tennessee which has a law prohibiting age discrimination. Plaintiffs, therefore, had 300 days to file their charges. Those charges, filed within 300 days, were timely.

If the extended period is not available, Ivey's charge was still filed within the required 180 days. He initially contacted the EEOC on November 21, 1991, and his charge was reduced to writing by the investigator.[11] This action constitutes a valid charge. 29 C.F.R. § 1626.7; *Steffen v. Meridian Life Insurance Co.*, 859 F.2d 534 (7th Cir. 1988); *Philbin v. GE Capital Auto Lease*, 929 F.2d 326 (7th Cir. 1991). Moreover, the document on which petitioner relies would be considered filed, when postmarked, not when received. 29 C.F.R. § 1628.8. Thus the date stamp, asserted by petitioner as the date the charge was filed, is inaccurate and irrelevant. Ivey's charge was, therefore, timely if required to be filed within 180 days.

Additionally, the question of deferral is also not part of the record, since it was never raised until this Petition was filed. Thus the petition should be denied to the extent it relies on a claim of procedural inadequacy of Ivey's charge.[12]

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11. Not part of the record because this issue was not raised below, the evidence is contained in Ivey's EEOC file.

12. Moreover, assuming petitioner could establish a requirement that the charge be deferred to a state agency, that would not support a reversal of the Sixth Circuit's opinion. Pursuant to *Oscar Mayer v. Evans*, 441 U.S. 750 (1979), deferral is not a jurisdictional requirement and therefore can be done at any time. In *Oscar Mayer*, deferral was permitted after this Court resolved the issue.

CONCLUSION

Gordon McNeely prays that this Court deny Holiday Inns' Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review, and because the Circuit Court's holding was not in error.

Respectfully submitted,

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Dated: October 2, 1995